

FEDERAL CIRCUIT COURT OF AUSTRALIA

Pham v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs [2021] FCCA 718

File number: SYG 821 of 2019

Judgment of: **JUDGE STREET**

Date of judgment: 13 April 2021

Catchwords: **MIGRATION** – Administrative Appeals Tribunal – application for a Partner (Residence) (Class BS) visa – whether the Tribunal failed to make findings that it was required to make – whether the Tribunal failed to consider relevant material – no jurisdictional error made out – amended application dismissed.

Legislation: *Migration Act 1958* (Cth), s. 476
Migration Regulations 1994 (Cth), reg. 1.15A

Cases cited: *He v Minister for Immigration and Border Protection* [2017] FCAFC 206

Number of paragraphs: 49

Date of hearing: 13 April 2021

Place: Sydney

Counsel for the Applicant: Mr L Karp

Solicitor for the Applicant: My T Nguyen Solicitors

Solicitor for the First Respondent: Ms S Roberts, Mills Oakley

ORDERS

SYG 821 of 2019

BETWEEN: THI BAO NGOC PHAM
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE STREET

DATE OF ORDER: 13 APRIL 2021

THE COURT ORDERS THAT:

1. The name of the first respondent is changed to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs” and the Court dispenses with the need for the filing of any further document in that regard.
2. Leave is granted to the applicant to rely upon the amended application annexed to the applicant’s submissions filed on 6 September 2019 and the Court dispenses with the need for the filing of the same.
3. The amended application is dismissed.
4. The applicant pay the first respondent’s costs fixed in the amount of \$5,400.00

REASONS FOR JUDGMENT

JUDGE STREET:

- 1 This is an application for a Constitutional writ within the Court's jurisdiction under s 476 of the *Migration Act 1958* (Cth) (“the *Act*”) in respect of a decision of the Administrative Appeals Tribunal (“the Tribunal”) made on 8 March 2019 affirming the decision of a delegate of the first respondent (“the Delegate”) not to grant the applicant a Partner (Residence) (Class BS) visa (“the Visa”).
- 2 The applicant applied for the Visa on 4 November 2013 on the basis of a relationship with the sponsor.
- 3 The Delegate refused the grant of the Visa because the Delegate was not satisfied that the applicant and the sponsor were in a genuine spousal relationship to the exclusion of all others.
- 4 The applicant applied for review on 4 April 2018. The applicant was invited to and attended a hearing before the Tribunal to give evidence and present arguments.
- 5 The Tribunal also sent an invitation to comment letter on 31 January 2019, in which the Tribunal referred to an allegation that the marriage was contrived for the purpose of obtaining a visa, including an allegation that the applicant is a lesbian, and referred to information on the department file, including photos obtained from the applicant's Facebook page prior to the invitation to comment letter sent by the department dated 14 December 2017, and an extract from the Facebook page after that letter was sent which shows a noticeable difference in the content. The letter identified that the Tribunal may find the Facebook page profile, before the Department sent the natural justice letter, is inconsistent with the applicant's claim to be in a genuine married relationship with the sponsor. In addition, the Tribunal noted that the photos of the sponsor subsequently may cause the Tribunal to have doubts about the genuineness of the relationship.
- 6 The Tribunal also identified what occurred at the hearing in relation to the making of a will by the sponsor, and the evidence that was given by the applicant in which she did not appear to know about the will and that she did not know that the sponsor had made a will, and the Tribunal found that this may impact on the genuineness of the relationship.

- 7 In its reasons, the Tribunal summarised the background to the review application and the need to meet the criteria under cl 801.221(2) of Sch 2 to the *Migration Regulations 1994* (Cth) (“the *Regulations*”).
- 8 The Tribunal referred to the hearing before the Tribunal on 23 October 2018 which the applicant attended to give evidence and present arguments.
- 9 The Tribunal identified that the issue in the present case was whether the applicant and the sponsor are in a genuine spousal relationship. The Tribunal correctly identified that the question of whether or not the parties met the criteria of being in a genuine and spousal relationship required consideration of the requirements of s 5F(2) of the *Act* including reg 1.15A(3) of the *Regulations*.
- 10 The Tribunal found that the parties were married and then turned to the other requirements in relation to a spousal relationship. The Tribunal identified its consideration of the evidence under the relevant headings of the matters it must take into consideration under reg 1.15A(3) of the *Regulations* and the reasons for its decision.
- 11 The Tribunal set out each of the principal matters under reg 1.15A(3) of the *Regulations*, identifying evidence concerning the same and having considered the evidence and having considered the findings the Tribunal had made cumulatively, the Tribunal concluded it was not satisfied the applicant and the sponsor had a mutual commitment to a shared life to the exclusion of others and/or are in a genuine and continuing relationship.
- 12 In these circumstances, the Tribunal found the applicants failed to meet the criteria under s 5F(2) and affirmed the decision under review.

BEFORE THE COURT

- 13 The ground of the amended application are as follows:
- (1) The Tribunal failed to complete the exercise of its jurisdiction.
 - (2) Particulars
 - (a) Failure to make findings that the Tribunal was required to make as to;
 - (i) The extent of the parties' pooling of financial resources (Migration Regulation 1.15A(3)(c)(i)).
 - (ii) Whether the financial aspects of the relationship supported the applicant's visa application (Migration Regulation 1.15A(3)(c)).

- (iii) Whether the parties represent themselves to others as being married (Migration Reg 1.15A(3)(c)(i)),
- (iv) The opinion of friends and acquaintances about the nature of the relationship (Migration Regulation 1.15A(3)(c)(ii)).
- (v) The basis on which the parties plan and undertake joint social activities (Migration Regulation 1.15A(3)(c)(iii)).
- (vi) Whether the social aspects of the relationship supported the applicant's visa application (Migration Regulation 1.15A(3)(c)).

14 Mr Karp of counsel, on behalf of the applicant, submitted that the Tribunal's reasons were ones in respect of which there was a deficiency in addressing the criteria in relation to the principal consideration of the financial aspects of the relationship in the making of what was said to be a need for findings on each of the subcategories in reg 1.15A(3)(a)(i) to (v) of the *Regulations*. In that regard, Mr Karp relied upon what was said by the Full Court in *He v Minister for Immigration and Border Protection* [2017] FCAFC 206 (“*He v MIBP*”), materially at paragraph 77 through to paragraph 80. That decision makes clear that there must be a real consideration given by the Tribunal to the mandatory requirement in reg 1.15A(3) of the *Regulations*, and findings referable to the principal matters, and that the absence of findings in respect of particular subsidiary matters might lead the Court to find that the Tribunal had failed to take into account the whole of the mandatory considerations in reg 1.15A(3) of the *Regulations*.

15 On a fair reading of the Tribunal's decision in the present case, the Tribunal clearly took into account the whole of regs 1.15A(3) (i) to (v). The Court does not accept the argument presented by Mr Karp that there must be individual express findings referable to each subparagraph in order to reveal that there has been a proper and genuine consideration of the requirements of reg 1.15A(3) of the *Regulations*.

16 In its reasons, the Tribunal carefully identified a heading referable to the financial aspects of the relationship. The Tribunal clearly identified each of the considerations that were advanced in support of the genuineness of the relationship, referring to the joint bank account and the evidence in relation to its use in that only the applicant's salary is deposited into that account. The Tribunal referred to the sponsor maintaining three accounts in his own name and that his salary is paid into an account in his own name. The Tribunal proceeded to consider that the applicant stated that the sponsor rarely uses the joint account and that the sponsor's evidence

on this was consistent. The Tribunal also referred to the evidence that since the commencement of the relationship, the sponsor has entered into three separate property transactions with his mother and brother-in-law in buying and selling property. The Tribunal noted that there was evidence adduced after the hearing as to the level of the sponsor's interest in that property, held as tenant in common. The Tribunal then also referred to joint purchases that had been made by the parties over the period of time of five years noting only a bed, a table and a car. The Tribunal also identified that the applicant and sponsor have each nominated each other as sole beneficiaries on their superannuation accounts.

17 The Tribunal expressly referred to having carefully considered the evidence in regard to the financial aspects of the relationship. The Tribunal referred to the timing of the sponsor's transactions in relation to buying the property with his mother and brother-in-law, just after the commencement of the relationship with the applicant, and found that that transaction did not support the existence of a genuine spousal relationship. The Tribunal referred to the applicant's explanation and accepted as reasonable and plausible that the property arrangement is a family enterprise and accepted evidence that the share is held distinctly as a tenant in common.

18 The Tribunal also referred to a will that was provided by the sponsor dated April 2014 naming the applicant as the sole beneficiary. The Tribunal identified concerns about the validity of that document in that it does not appear to have been properly executed. That deficiency was acknowledged by the applicant's representative. The Tribunal also raised the fact that the applicant had answered in the negative as to whether she knew there was such a will. The Tribunal did not consider the document entitled Will was a genuine and valid document and gave it no weight in the assessment in the relationship, and took into account that no other valid will had been provided by either the applicant or the sponsor.

19 The Tribunal also addressed the topic of the nature of the household and referred to the rental accommodation and the evidence supporting that the applicants lived at the addresses as identified, and referred to an inconsistency in respect of the sponsor's mother's evidence in relation to the claims about living arrangements.

20 The Tribunal identified that there are no children and took into account the daily activities. The Tribunal expressed concern about the evidence of the applicant being brief, vague, lacking convincing detail and authenticity. The Tribunal observed that the sponsor's responses when asked similar questions by the Tribunal were almost too consistent with that the

applicant's and gave the impression that they had been rehearsed. The Tribunal found that neither offered at least any evidence of responsibility for household tasks between them other than that the applicant shares cooking with her mother-in-law and that they all eat together. The Tribunal nonetheless was prepared to accept that the applicant and the sponsor resided at the same address and found that the evidence that they are living together as a genuine married couple to be limited and unconvincing.

- 21 The Tribunal then turned to the social aspects of the relationship. The Tribunal had earlier identified in paragraph 18 of its reasons that it had been provided with evidence as to the existence of a genuine and ongoing relationship and referred to the letters, superannuation accounts, payslips, receipts, photos, and statutory declarations from friends and the sponsor, and identified each of the persons who made statutory declarations and their alleged relationship. The Tribunal referred to those friends stating that they are aware of the allegations made in the application. That is clearly a reference to all of the statements in which such allegations are referred to. The Tribunal's reasons are not to be read with a keen eye for error. The absence of express reference to the allegations in each of the statutory declarations does not mean that there was not a real and genuine consideration of the statutory declarations by the Tribunal.
- 22 The Tribunal referred to the substance of the statutory declarations attesting that the applicant and the sponsor are a genuine couple in an ongoing and committed relationship. That is a fair summary of the substance of each of the statutory declarations to which the Court was taken in detail by Mr Karp at pages 462 through to 479 in the Court book.
- 23 The Tribunal, in its reasons at paragraph 56, concerning the social aspects of the relationship, referred to the evidence that had been adduced including the statutory declarations provided at the time of application from the sponsor's sister and applicant's cousin, and referred to persons asserting presence at their wedding that occurred in October 2013.
- 24 The Tribunal also referred to further information provided by a cousin essentially repeating the content of the first declaration, and referred to subsequent declarations in 2017 provided by the sponsor's mother, a work colleague and a friend identifying the same and stating what they know of the couple from the past two years.
- 25 The Tribunal, however, identified some concern about the reliability of the mother's declaration given the information about the residential address and living arrangements. The

Tribunal referred to two other statutory declarations, nothing the brief information contained that they had known the parties over two years and they see them from time to time on a social basis.

26 The Tribunal also took into account the photos submitted showing the couple in various contexts as a couple and socialising with friends and family. The Tribunal relevantly made a finding that it accepts that the evidence indicates the applicant and the sponsor are known as a couple and have presented as such to friends and family since their marriage has been provided.

27 The Tribunal expressly referred to evidence that had been provided in relation to declarations for tax purposes and in respect of health and car insurance.

28 The Tribunal referred to the parties' travel and the absence of any other holidays in the five years since their marriage.

29 The Tribunal then turned to the issue of the nature of the applicant's and the sponsor's commitment to each other. The Tribunal identified the claim of commencement of the cohabitation from a week before the wedding in October 2013 and that they had been living together since. The Tribunal accepted on the evidence before it that they had resided at the same address from 2013 to date, but found the evidence that they are living together as a genuine married couple to be limited and unconvincing.

30 The Tribunal also found the evidence regarding the degree of support they draw from one another to be unconvincing. The Tribunal referred to the applicant being unable to say much about what she and the sponsor talk about or share together. The Tribunal referred to having raised doubts with the applicant as to the genuineness of the relationship and her inability to provide more detail about their daily life, and she said that after eight hours of work each day she is tired and they do not talk much. The Tribunal found that response unconvincing and lacking in credibility. After five years of marriage and cohabitation, the Tribunal would have expected a genuine married couple to be able to describe their daily routines and the nature of their particular commitment or a relationship in more detail and more convincingly. The Tribunal found that their inability to do so contributes to the Tribunal's doubts about the genuine nature of their relationship and whether is long term and ongoing.

31 The Tribunal referred to claims concerning future plans to buy a property and have children together. However, the Tribunal observed that after five years of marriage, the sponsor has

bought and sold three properties together with his family members rather than with the sponsor, and that there is no evidence to support that they are trying to have children together. The Tribunal was not convinced on the available evidence that the applicant's and the sponsor's actions support their stated claims regarding a shared future.

32 The Tribunal then turned to other aspects of the relationship and referred to the Facebook photos. The Tribunal referred to the s 259 letter sent under the *Act* and the applicant acknowledging that the Facebook pages were hers and the explanation that the sponsor previously did not want to post photos of them as a couple. The Tribunal referred to the Facebook pages and the applicant's responses and the explanation that the sponsor did not like social media, and that the applicant uploaded photographs after she was told of the allegation to disprove it and to support that they are a happily married couple. The Tribunal found this explanation not to be convincing or credible.

33 The Tribunal gave little weight to the allegation as to the sexuality of the applicant as it was not based on any reliable evidence, but found the composition of the Facebook pages obtained by the Department did not support that they are in a genuine relationship or presented as a couple before the Department put the allegation to the applicant. The Tribunal gave this some weight in its assessment of the genuineness of the relationship in circumstances where the applicant has been active with her posting activity on Facebook.

34 The Tribunal referred to the applicant's responses to questions about the will and considered the evidence of the applicant and the sponsor on this to be problematic. The Tribunal referred to the applicant's absence of knowledge of the sponsor having made a will. The Tribunal referred to the s 359A letter concerning the same and the observation that the will did not appear to be valid. The Tribunal did not find this to be a credible or convincing explanation for the applicant's response when asked about whether or not the sponsor had made a will. The Tribunal also took into account the failure to make a proper will after four years of the relationship. The Tribunal found that the fact that the sponsor does not have a valid will in the circumstances where he had bought and sold property does not support that they are in a genuine spousal relationship.

35 The Tribunal, under a heading *Conclusions*, noted that it had carefully considered all of the evidence and the findings above cumulatively and holistically. The Tribunal said that while it accepted the parties provided generally consistent evidence in relation to a number of the matters referred to in reg1.15A of the *Regulations*, it was not, on balance, satisfied that the

evidence which supports the existence of a genuine relationship outweighs concerns it has in relation to the matter of the will and the evidence of the Facebook pages. The Tribunal noted that this, together with a lack of convincing evidence regarding the companionship and support that they draw from each other, leads the Tribunal to conclude that it is not satisfied that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others and are in a genuine and continuing relationship. The Tribunal did accept that they reside at the same address but was not satisfied that they are living together in a genuine spousal relationship.

36 In the context of these findings, the Tribunal found that it was not satisfied that the requirements of s 5F(2) of the *Act* are met and affirmed the decision under review.

37 The reasoning of the Tribunal referred to above, consistent with the requirements of *He v MIPB*, makes findings in respect of the principal matters required under reg 1.15A(3)(a), (b), (c) and (d) of the *Regulations*. The Court does not accept that the absence of an express conclusion in relation to the limited pooling of assets or an express conclusion about whether the financial aspects supported the relationship in its consideration of reg 1.15A(3) were first set out, or an express finding in relation to the representing of the parties to others in the language of reg 1.15A(3)(c)(i) or the opinions of friends and acquaintances in terms of an express finding under reg 1.15A(3)(c)(ii) on the basis of the parties' plans and undertaking of joint social activities under reg 1.15(3)(c)(iii), support a finding that the Tribunal failed to take into consideration the whole of the requirements of reg 1.15(3)(a), (i) to (v), and relevantly in respect to the argument advanced at reg 1.15A(3)(c)(i) to (iii).

38 The Court does not accept that the Tribunal did not make findings in respect of the principal matters as identified above. The Tribunal was not required to expressly identify, in respect of the considerations required in respect of each subcategory of regs 1.15A(3)(i) to (v) of the *Regulations*, a finding of the kind advanced by Mr Karp referable to that particular Roman numeral subparagraph a conclusory finding as to how that advances or detracts from the financial relationship.

39 The Tribunal's reasons are to be read as a whole. It is clear that the Tribunal turned its mind to the issue of joint ownership, to the issue of joint liabilities, to the issue of pooling of financial resources, and to the legal obligations between the parties and the sharing of day-to-day household expenses. The Tribunal's reasons reflect a genuine intellectual engagement, and as such a lawful consideration, of each of the requirements.

- 40 Under the first principal heading, the Court does not accept that the Tribunal was required, as Mr Karp contends, to make conclusory findings in respect of each Roman numeral subparagraphs. A fair reading of the Tribunal's reasons reflects the Tribunal considering each of the mandatory criteria under subparagraph (i) to (v) of reg 1.15A(3)(a). A fair reading of the Tribunal's reasons also reflects the Tribunal having a lawful consideration of each of the requirements of (i) to (iii) of reg 1.15A(3)(c) of the *Regulations*.
- 41 The Tribunal's reasons in that regard clearly accept the representation of the parties to others and have made express findings referable to the social aspects of the relationship. Those findings do identify considering how the applicant and sponsor represent themselves to other people, the opinion of friends and acquaintances as well as the personal plans of the parties and the undertaking of social activities.
- 42 The Court does not accept Mr Karp's submission, in relation to the social aspects, that the Tribunal was required to make an express finding on each subparagraph (i) to (iii) identifying how each subparagraph advanced or detracted from a conclusion referable to the social aspects of the relationship as to whether there was a genuine and spousal relationship. A fair reading of the Tribunal's reasons reflect a genuine intellectual engagement and a lawful consideration of each of the mandatory requirements under reg 1.15A(c)(i) to (iii).
- 43 In these circumstances, no jurisdictional error as alleged in ground 1 is made out.
- 44 In relation to ground 2, Mr Karp submitted that the Tribunal had failed to take into account or have a genuine intellectual engagement with the statutory declarations to which the Court has earlier referred and was taking at pages 462, 464, 466, 468, 470, 472, 474, 477 and 479.
- 45 Mr Karp's submissions, in substance, were an invitation to engage in a merits review. Mr Karp's submission that the Tribunal had not had a genuine intellectual engagement with those statutory declarations because of the limited content of paragraph 18 of the Tribunal's reasons, and the last sentence of the same, is not to read the Tribunal's reasons as a whole. The Tribunal's reasons in relation to the statutory declarations must be read as a whole and they have clearly been referred to, not just in relation to paragraph 18, but also in the reference to the social aspects that were considered when the Tribunal referred to those included in paragraph 56 and the express reference to some of the statutory declarations in that regard.

- 46 It is also relevant, in relation to the degree to which the Tribunal must engage with the relevant evidence, that this is a case where the Tribunal accepted that the evidence indicates the applicant and sponsor are known as a couple and have presented as such to friends and families since their marriage.
- 47 The Court does not accept Mr Karp's submission that the statutory declarations were in these circumstances central to the case and required further express consideration and findings. The Tribunal reasons on a fair reading reflect a genuine intellectual engagement with the whole of the applicant's claims and evidence, including the relevant statutory declarations.
- 48 No jurisdictional error as alleged in ground 2 is made out.
- 49 Accordingly, the amended application is dismissed.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the transcript of the published oral reasons for judgment of Judge Street delivered in open Court on 13 April 2021 and the parties were sent a sealed copy of the Court's orders.

Associate:

Dated: 11 May 2021